

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

FILED
08/25/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0829-R-2022
Lambert, Kathryn
10.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Wagner Land Development, Inc.

CASE 43B-0829-R-2022
43B 30115924

NOTICE OF FILING OF AMENDED MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

AMENDED MASTER'S REPORT

Wagner Land Development Inc. claim 43B 30115924 appeared in the Preliminary Decree with the following issue remark: NO PRIORITY DATE WAS CLAIMED. The issue remark was not addressed and resolved through the objection process. The Legislature has directed the

Water Court to resolve the issue remarks using the procedures set forth in section 85-2-248, MCA.

The January 13, 2023 Court Minutes, Order Entering Default, and Order Setting Deadlines Pursuant To Section 85-2-248(5), MCA set various deadlines for the claimant and the Bozeman Regional Office, Montana Department of Natural Resources and Conservation [“DNRC”]. On April 25, 2023 and April 28, 2023 DNRC Memoranda were filed. The second DNRC Memorandum states that the claimant never contacted the DNRC as directed in the Order. Nothing was filed by the claimant.

The May 3, 2023 Second Order Entering Default and Order Setting Deadline Pursuant To Section 85-2-248(9)(a), MCA states in full:

The January 13, 2023 Court Minutes, Order Entering Default, and Order Setting Deadlines Pursuant To Section 85-2-248(5), MCA [“Order”] set an April 10, 2023 deadline for the claimant to file documentation resolving the issue remark. Nothing was filed.

As Wagner Land Development, Inc. did not comply with the Order, pursuant to Rule 55(a), M.R.Civ.P. and Rule 22, W.R.Adj.R., it is

ORDERED that the SECOND default of Wagner Land Development, Inc. is ENTERED.

On April 25, 2023 the Montana Department of Natural Resources and Conservation [“DNRC”] filed a Memorandum. On April 28, 2023 the DNRC filed an Addendum To April 18th Memorandum. The second Memorandum states that Wagner Land Development, Inc. never contacted the DNRC as directed in the Order. The first Memorandum suggests a possible priority date but it is unknown if there was a water right appropriated on the suggested date.

Exempt Stock Use Statement of Claim 43B 30115924 was filed Jim Wagner on July 24, 2017. Section 85-2-222(1)(b), MCA, states that a person claiming an exempt right “shall submit information required by 85-2-224(1) and (2) on a form provided by the department”. Section 85-2-224(1), MCA, lists the information which *must* be included on a statement of claim, including “(f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (1)(c)”. Statement of Claim 43B 30115924 is blank at Item 13 “**Date of first use:** _____.” Section 85-2-224(2), MCA, states that the claimant filing a statement of claim *shall* submit “other evidence in support of the claim.” Item 13 on the Statement of Claim states: “Attach copies of the decree, record of filing, or proof of use right.” No proof of a use right – appropriated ever – is attached to Statement of Claim 43B 30115924. As a result, the following issue remark was added to this claim: NO PRIORITY DATE WAS CLAIMED. Without identification and proof of the water

right claimed, it is not possible for the Court to decree some unidentified mystery water right in this adjudication.

The original claimant failed to identify and provide proof of the right claimed. The successor claimant has repeatedly failed to comply with Court Orders issued to address the issue remark so the Court can decree an existing water right. The record is devoid of any indication this is an existing water right. Absent this critical information identifying what existing water right is being claimed, there is nothing for the Court to decree.

Pursuant to 85-2-248(9)(a), MCA, it is

ORDERED that the deadline is **June 5, 2023** for Wagner Land Development, Inc. to show cause in writing why the Court should not proceed with dismissing claim 43B 30115924 as Wagner Land Development, Inc. has failed to identify the existing right attempted to be claimed. If no additional information is filed by June 5, 2023, the Court will conclude that Wagner Land Development, Inc. agrees claim 43B 30115924 should be dismissed because there is no existing water right claimed.

Nothing was filed by the claimant.

On July 28, 2023 the Master's Report was filed recommending dismissal of the claim. On August 8, 2023 the claimant filed a Response To Notice Of Filing Of Master's Report stating that none of the above Orders were forwarded to him at his new address. This Response provides the information needed to address and resolve the issue remark. These documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right Exempt Domestic Use is prima facie proof of its content pursuant to section 85-2-222, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. The Preliminary Decree does not include a priority date. The priority date should be JUNE 1, 1898. The priority date issue remark should be removed as addressed and resolved.

2. The Preliminary Decree also includes the following notice remark:

THIS EXEMPT CLAIM WAS FILED ON 07/24/2017. THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 43B DECREE ISSUED 01/16/1985.

The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The information provided by the claimant is sufficient to resolve the issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via Electronic Mail:

Joseph T. Swindlehurst, Esq.
PO Box 523
Livingston, MT 59047
(406) 222-2023
joe@hswlegal.com
anna@hswlegal.com

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 30115924 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: WAGNER LAND DEVELOPMENT, INC
8665 BAY COLONY DRIVE APT 1504
NAPLES, FL 34108 6772

Priority Date: JUNE 1, 1898

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: TRAIL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESESW	18	3S	8E	PARK
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		SWNESW	18	3S	8E	PARK
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3		SWSE	18	3S	8E	PARK
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NESESW	18	3S	8E	PARK
2			SWNESW	18	3S	8E	PARK
3			SWSE	18	3S	8E	PARK